

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No. 2145/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

CORVINE INVESTMENTS CC

Plaintiff

and

ADVTECH (PTY) LTD t/a PROPERTY DIVISION

Defendant

JUDGMENT

Todd AJ

[1] This is an application for leave to appeal against my judgment handed down on 15 May 2023. That judgment dealt with the Applicant's application for leave to appeal against the judgment and order I had made dated 17 August 2022. The Applicant had brought the application for leave to appeal out of time.

- [2] In my judgment of 15 May 2023 (paragraph [8]) I concluded that the Applicant does not have a reasonable prospect of success on appeal, and that a weak explanation had been provided for what was in the context of an application for leave to appeal a substantial delay. After weighing the factors relevant to a decision whether it was in the interests of justice to grant condonation, I decided to refuse condonation.
- [3] The Applicant now brings the present application for leave to appeal against the condonation decision. It does so because it wishes to approach the Supreme Court of Appeal to seek leave to appeal under the provisions of section 17(2)(b) of the Superior Courts Act.
- [4] On the strength of the decision in *National Union of Metalworkers of South Africa v Jumbo Products CC 1996 (4) SA 735 (A)*, the Applicant submits, my decision refusing condonation for the late application for leave to appeal (in my judgment dated 15 May 2023) does not constitute the refusal of leave to appeal in the sense contemplated in section 17(2)(b) of the Superior Courts Act 10 of 2013. Since I dismissed only the application for condonation, and not the application for leave to appeal on the merits, there is at this stage no jurisdictional basis for the Applicant to approach the Supreme Court of Appeal under the provisions of that section.
- [5] I have considerable difficulty with the proposition that my judgment of 15 May 2023 does not constitute the refusal of leave to appeal within the meaning of section 17(2)(b) of the Superior Courts Act. I must accept, however, that this is the conclusion that was reached by the Appellate Division (as it then was) in broadly similar circumstances in *NUMSA v Jumbo Products*.
- [6] In that case the Court *a quo*, in refusing condonation, had expressly stated that it did not base its refusal of condonation on its views on the merits of the application. In the present matter, on the other hand, I had expressly considered the prospects of success on appeal, and had concluded (in paragraph [8] of the judgment of 15 May 2023) that the Applicant “*does not have a reasonable prospect of success on appeal*”. Having considered the grounds on which condonation was sought,

however, and having then concluded that the explanation given for the delay in bringing the application for leave to appeal was weak, I then concluded, taking into account the various considerations relevant to an assessment of the interests of justice, that condonation should be refused. This difference in reasoning does not, however, bring the present matter outside the ambit of the principle asserted in *NUMSA v Jumbo Products*.

- [7] In *NUMSA v Jumbo Products* the court suggested, as one way to avoid the “*considerable procedural inconvenience*” (paragraph 22 of the judgment) that faces a litigant in the position of the present Applicant, that “*the trial Court might, and ordinarily should ... make an order refusing both the application for condonation and the application for leave to appeal on the merits*”. In that event, the Appeal Court could then consider (and if so persuaded, grant) both appeals at the same time.
- [8] I do not see how a Court could properly, after concluding that it should refuse to condone the late bringing of an application for leave to appeal, nevertheless go on to consider and dismiss that application. The only way this could be achieved, it seems to me, would be for the Court to hold that despite the absence of good grounds for condonation, the late bringing of the application was in fact condoned. This would bring into play the application for leave to appeal itself, and that application could then be dismissed.
- [9] I cannot, with respect, see that this is what the legislature could have intended, nor that such an approach is either pragmatic or appropriate, or that it would be necessary to establish the “refusal” of leave in the sense contemplated in section 17(2)(b) of the Superior Courts Act.
- [10] It seems to me that this, with great respect, is a point that should be revisited by the relevant Court at an appropriate juncture. On a proper consideration of the provisions of section 17(2)(b) of the Superior Courts Act, it seems to me, where an application for condonation has been brought for the late delivery of an application for leave to appeal, and the application (for condonation) has been argued

together with the merits of the application for leave to appeal, and condonation has been refused, this constitutes the refusal of leave to appeal by the court *a quo* as contemplated by the provisions of section 17(2)(b) of the Superior Courts Act. I cannot see that it would be permissible for the Court *a quo* to go on to decide an application for leave to appeal itself after refusing condonation, or “in the same breath” as doing so. If condonation is refused, there is no basis thereafter for the Court to either grant or refuse the application for leave to appeal. In my view this must nevertheless constitute the refusal of leave to appeal within the ambit of section 17(2)(a).

- [11] The procedural quagmire in which the present Applicant is now placed, in which it must (if it wishes to pursue its aspiration to appeal further) first prosecute an appeal on the condonation issue, and if that appeal succeeds then return to the court *a quo* once again with its “main application” for leave to appeal, seems to me to be highly undesirable for all litigants, for Courts, and for the administration of justice more generally.
- [12] I do not, with great respect, believe that this can be what was intended by the provisions of section 17(2)(b), or that this situation could be avoided only by a decision of the Court *a quo* to dismiss both the condonation application and, at the same time, the application for leave to appeal itself.
- [13] Nevertheless, I accept that in the present circumstances I am bound by the decision in *NUMSA v Jumbo Products*, and I now need to consider the application for leave to appeal against my judgment of 15 May 2023 in which I dismissed the application for condonation.
- [14] I have carefully considered the lengthy submissions of Mr Louw on this question. I have also again considered the question whether, as Mr Louw submitted, the explanation for the delay was in fact reasonable or legitimate in the circumstances, and not “weak” as I characterized it in my judgment of 15 May 2023. I have also considered Mr Louw’s submission that the prospects of success on appeal are in

fact strong, for reasons that are dealt with at length both in written heads of argument and in the oral submission of Mr Louw at the hearing of this application.

[15] I am not persuaded by these submissions. I can see little prospect of another Court reaching different conclusions from those that I reached in the main judgment and in the judgment dismissing the application for condonation in relation to the application for leave to appeal. As a result, in my view, the Applicant does not have reasonable prospects of success on appeal against the condonation judgment.

[16] In the circumstances, the application for leave to appeal against the judgment of 15 May 2023 falls to be dismissed.

[17] I make the following order –

The application for leave to appeal is dismissed, with costs.

C.Todd

Acting Judge of the High Court of South Africa.

REFERENCES

For the Applicant: Adv. A J Louw SC with Adv. H C Van Zyl

Instructed by: Lily Rautenbach Attorneys

For the Defendant: Adv. D Van Niekerk

Instructed by: Cliffe Dekker Hofmeyer Inc.

Judgment reserved: 28 November 2023

Judgment delivered: 30 November 2023